LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 17 1971
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. .....71 - 395

AUDIE STONE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

THOMAS W. THOMSON,
911 Bank of Knoxville Building,
Knoxville, Tennessee 37902,

Counsel for Petitioner.

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee. Phone 525-4282

9-15-71-45

INDEX

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
HOW FEDERAL QUESTION IS RAISED	2
QUESTION PRESENTED	6
CONSTITUTIONAL PROVISIONS INVOLVED	6
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	9

TABLE OF CASES

Briethaupt v. Abram, 352 U.S. 432, 77 S. Ct. 408	8
Buchalter v. People of State of N. Y., 319 U.S. 427, 63 S. Ct. 1129	8
Clemons v. State, 92 Tenn. 282, 21 S.W. 525	7
Escabedo v. Illinois 378 U.S. 478, 84 S. Ct. 1758	8
Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792	8
Malinsky v. People of State of N. Y. 342 U.S. 401, 65 S. Ct. 781	9
Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065	8

TENNESSEE CODE ANNOTATED

Sec. 40-2403	4

INDEX TO APPENDIX

Opinion of Supreme Court of Tennessee	A1
Opinion of Criminal Court of Appeals	A3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. .....

AUDIE STONE,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Audie Stone prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Tennessee entered in this cause on June 21, 1971.

CITATIONS TO OPINIONS BELOW

Opinions of the Supreme Court of Tennessee are unreported and are not marked for publication. Copy of the original opinion of the Supreme Court of Tennessee is annexed hereto at A1. Opinion of the Court of Criminal Appeals of Tennessee dated April 6, 1971, is annexed at A3.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered June 21, 1971, and jurisdiction here is invoked under 28 U.S.C. 1257 (3).

HOW FEDERAL QUESTION IS RAISED

In order to present this matter in the most favorable light to the State of Tennessee, we shall quote verbatim pertinent portions from the Brief of the Attorney General of Tennessee which was filed in this cause, as follows:

"That, on March 25, 1970, Plaintiff-in-Error, Audie Stone, hereinafter referred to as the Defendant, was convicted by a jury in Bradley County Criminal Court of petit larceny (Case No. 41) and assault and battery (Case No. 42). That the defendant was sentenced to serve a term of not less than, nor more than one (1) year in the State Penitentiary for the larceny conviction and was fined one hundred dollars ($100.00) and costs for the assault and battery conviction. (Case No. 41-TR. 8-9) (Case No. 42-TR. 7-8) (BE. 74-75) .....

That, on April 10, 1970, the defendant filed motions for a new trial (Case No. 41-TR. 12-14) (Case No. 42-TR. 11-13), which were overruled by the Trial Court on May 11, 1970. (Case No. 41-TR. 15-16) (Case No. 42-TR. 14-15) That in its orders overruling the motions for new trials, the Trial Court granted the appeals prayed for and the defendant was given ninety (90) days to file his Bill of Exceptions and otherwise perfect his appeals. (Case No. 41-TR. 15-16) (Case No. 42-TR. 14-15)

That, on July 10, 1970, the defendant filed a voluntary waiver of appeal and a petition for parole and/or suspension of sentence, pursuant to T.C.A. 40-2901 et seq., in both cases. (Case No. 41-TR. 17-20) (Case

No. 42-TR.16-19)

That on July 17, 1970, the Trial Court entered orders in both cases denying the defendant's motions for a suspended sentence and further ordering the defendant to begin serving his sentences. (Case No. 41-TR. 22-23) (Case No. 42-TR. 21-22)

That on July 24, 1970, the defendant filed, in both cases, a motion to withdraw waiver of appeal. (Case No. 41-TR. 24) (Case No. 42-TR. 23) That, also on this date, the Trial Court entered an order in both cases allowing the waivers of appeal to be withdrawn and allowing to perfect an appeal to this Court. (Case No. 41-TR. 25-26) (Case No. 42-TR. 24-25)."

Present counsel did not represent petitioner in the Trial Court or in the Court of Criminal Appeals or in the Supreme Court of Tennessee.

At the very beginning of this trial counsel for the petitioner attempted to seek a continuance by reason of the petitioner's illness, and the Court stated:

"Mr. Summers, if you are making a motion for a continuance, I am going to overrule you. I talked to his doctor personally, and his doctor assured me that he was well able to stand trial, so I am going to overrule you. Now, what else do you have, sir?

"Mr. Summers: Your Honor, can I put on proof for the record?

"The Court: No, sir, I am not going to put on any proof. I have talked to the doctor, and the doctor isn't here.

"General Taylor: is he making a motion for a continuance?

"The Court: Yes, sir, and I am overruling it.

"General Taylor: What is the grounds?

"The Court: Well, I have already overruled the matter. It doesn't make any difference now. Now, what else do you have?

"Mr. Summers: May I respectfully note an exception? (TR. p. 2)

Tennessee Code Annotated, Sec. 40-2403 provides that the defendant desiring to testify shall do so before any other testimony for the defense is heard by the Court trying the case. At the conclusion of the State's proof counsel for the petitioner made the following motion:

"Your Honor, I would like to make a motion, and of course, I know what the law is, but I feel like it is a law that might possibly ought to be changed, and I have raised it one time, but unfortunately I won the case, so I didn't have a chance to, but Your Honor, the State of Tennessee requires that if the defendant is to testify, he is to be the first witness for the defense. I feel like at this time I cannot determine whether I wish to put Mr. Stone on or not, and I therefore, would ask, and I feel that this Statute is unconstitutional based on the fact that it makes a man be a witness against himself. Now at this time I do not feel that the State has made out a sufficient case for me to put him on, but after hearing my own witnesses it may be necessary. Therefore, I would ask the Court, I would like to put other proof on ahead of Mr. Stone and reserve the right to put him on if I so deem at the end of my proof.

"The Court; All right. Let it be overruled." (TR. p. 37)

It is appalling that the Attorney General of Tennessee would insist to the Supreme Court of Tennessee and to the

Court of Criminal Appeals that petitioner had received a fair and impartial trial and had been convicted by due process of law. Even going so far as to indicate that by choosing probation, then he is estopped from appealing. The fallacy in this analogy is that this defendant was never placed on probation. In fact, it appears to be a comedy of errors. The Court then allowed the withdrawal of waivers of appeal. The thought is then projected as to the entry of an order more than thirty (30) days after the judgment became final. Even so, the Bill of Exceptions was prepared and filed within the period of ninety (90) days, and the Assignment of Errors and Brief were also filed within the correct period of time.

The evidence upon which petitioner was convicted consists of the following:

Petitioner owned a restaurant and truck stop which catered to the public. Between 1:00 and 1:30 A. M., on February 14, 1970, James Constable in company with his wife, sister-in-law and brother-in-law, stopped at defendant's restaurant on their return trip from Florida to Ohio. Constable's wife requested of petitioner water and ice in a cup, for which he made a charge of 25¢. Mrs. Constable went outside to obtain the money from her husband who was in the car, and the petitioner followed. There seems to be a conflict as to what occurred outside of the restaurant. Part of the testimony indicates that petitioner demanded of Constable a dollar, and in this discussion petitioner hit Constable in the head with a pistol. On the other side of the coin, he pulled a knife on petitioner, and petitioner then hit him in the head with a gun, and that Constable threw a dollar bill on the ground.

The jury returned a verdict of petit larceny and a sentence of one year as to one case, and returned a verdict

as to assault and battery and a fine of one hundred dollars ($100.00) in the other case.

QUESTION PRESENTED

Was petitioner denied due process of law and equal protection of the law guaranteed him under the Fifth and Fourteenth Amendments to the Constitution, by reason of his being deprived of a fair and impartial trial and appeal?

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent portions of the Fifth Amendment to the Constitution of the United States provide:

> "No person shall be * * * deprived of life, liberty or property, without due process of law; . . ."

Pertinent provisions of the Fourteenth Amendment to the Constitution of the United States provide:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

REASONS FOR GRANTING THE WRIT

The question presented here is of major importance and extremely significant to the administration of justice. It is of utmost importance that no one be imprisoned without a fair and impartial trial and a fair and impartial consideration of an appeal, irregardless of semantics.

The conviction of the petitioner is shocking to the conscience. The basis for the conviction is unfathomable, unless it was caused by the demeanor of the Trial Court and the unusual item of a cup of ice causing the controversy.

Counsel for the petitioner in the Trial Court took a premeditated gamble in not placing the petitioner on the stand first as required by Tennessee law. *Clemons v. State*, 92 Tenn. 282; 21 S.W. 525.

Instead a motion was made to allow the petitioner to be placed on the stand at the conclusion of all of the witnesses for the defense. What happened, of course, was that the petitioner was never placed upon the stand.

Counsel for petitioner could have preserved his rights by taking an exception to the Court's ruling and then placing the petitioner on the stand first and then the remainder of the witnesses. Such action by counsel for petitioner in the Trial Court can only be viewed in its best light as incompetence. Certainly petitioner should have had an opportunity to be represented by competent counsel wherein all of his rights would be protected. The simple reading of the Statute and some case law would make even a wayfaring fool knowledgeable as to being mandatory and imperative that petitioner take the stand first. Such action on the part of counsel for petitioner at the Trial Court amounts to the highest incompetence, for you cannot play with liberty of an individual like the cast of dice. Liberty is something that must be safe-guarded jealously and not thrown away on the premise of testing a known law which had been in existence since 1887. The representation was so lacking in diligence and competence that it reduced the trial to a mockery of justice.

The Fifth Amendment guarantees protection to everyone against conviction not pursuant to due process. The action of the Court in now allowing the petitioner to testify last indicates on its face that the Tennessee Statute is unconstitutional, for it restricts the petitioner's presentation of his defense. Where the action of a State, through either its executive, legislative, or judicial branches violates a federal right, the State thereby violates the Fourteenth Amendment with respect to due process and privileges and immunities. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065; *Escabedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792.

Due process requires that action by a State through any of its agencies must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which are infrequently designated as the law of the land. *Buchalter v. People of State of N. Y.*, 319 U.S. 427, 63 S. Ct. 1129.

Due process is aptly defined in *Briethaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, wherein the Court said that it is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.

Normally the decision of the Supreme Court of Tennessee is entitled to great weight. However, the apparent lack of concern by the Court is self evident in making the decision on a motion to dismiss. Said decision was predicated on a false premise in that petitioner had not accepted the benefits of probation. This Court has stated in apply-

ing the due process clause, that this Court must move within the limits of accepted notions of justice, and as important safeguard against such merely individual judgment is an alert deference to the judgment of the State Court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty. *Malinsky v. People of State of N. Y.*, 324 U.S. 401, 65 S. Ct. 781.

CONCLUSION

Justice requires that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

THOMAS W. THOMSON
911 Bank of Knoxville Building
Knoxville, Tennessee

Counsel for Petitioner

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

AUDIE STONE,
Plaintiff-in-Error

V.

STATE OF TENNESSEE,
Defendant-in-Error

BRADLEY COUNTY
NOS. 41 & 42

ORDER

(Filed April 6, 1971)

This cause came on to be heard today upon the state's motion to dismiss the appeals herein; and, after hearing argument of counsel and considering the records herein, this Court is of the opinion that the state's motion is well taken and should be sustained.

IT IS, THEREFORE, ORDERED that the appeals in these cases are hereby dismissed. The plaintiff-in-error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of appeal. A procedendo will issue to the said Criminal Court of Bradley County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

Entered this 6th day of April, 1971.

/s/ Mark A. Walker
MARK A. WALKER
Presiding Judge

/s/ Robert K. Dwyer
ROBERT K. DWYER, Judge

/s/ William S. Russell
WILLIAM S. RUSSELL, Judge

Office of CLERK OF SUPREME COURT
For the Eastern Division of the
State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order of said Court, pronounced at its September term, 1970, in the case of AUDIE STONE against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 9th day of September, 1971.

/s/ John A. Parker, Clerk

SUPREME COURT OF TENNESSEE AT KNOXVILLE
SEPTEMBER TERM 1970

DECREE

(Filed June 21, 1971)

Audie Stone
Vs.
State of Tennessee

Bradley Criminal
WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Bradley County, opinion and ..... of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner Audie Stone will pay the costs incident to filing petition for certiorari, for which let execution issue.

ROSS W. DYER, J.
LARRY CRESON, J.
George F. McCanless, J.

Office of CLERK OF COURT OF CRIMINAL APPEALS
For the Eastern Division of the
State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order of said Court, pronounced at its April term, 1971, in the case of AUDIE STONE against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 9th day of September, 1971.

/s/ John A. Parker, Clerk

COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-395

AUDIE STONE,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF CRIMINAL APPEALS

BART C. DURHAM, III
Assistant Attorney General
State of Tennessee
211 Supreme Court Building
Nashville, Tennessee 37619
Attorney for Respondent

Of Counsel
DAVID M. PACK
Attorney General

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

TABLE OF CONTENTS

	Page
Introductory Statement	1
Argument	2
A. The Trial Judge did not improperly deny a continuance	2
B. The petitioner has not been denied his right to effective assistance of counsel	2
C. Petitioner was not denied an appeal because he voluntarily relinquished his right of appeal	3
Conclusion	4
Appendix A (Tennessee Code Annotated §§ 40-2901-2904)	A-1
Appendix B (Opinion, Tennessee Criminal Appeals, Sams v. Russell, not reported)	A-4

Table of Cases Cited

Anderson v. Thompson, 75 Tenn. (7 Lea.) 259 (1881)	3
Atchley v. State, 176 Tenn. 574. 144 S.W.2d 748 (1940)	3
Helton v. State, 195 Tenn. 491, 260 S.W.2d 260 (1953)	3
Hethcoat v. State, 213 Tenn. 563, 376 S.W.2d 478 (1964)	3
Mooneyham v. State of Kansas, 339 F.2d 209 (10th Cir. 1964)	3
Sams v. Russell (unreported, filed July 31, 1970)	3
State v. Mooneyham, 192 Kan. 620, 390 P.2d 215, cert. denied 377 U.S. 958	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-395

AUDIE STONE,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF CRIMINAL APPEALS

INTRODUCTORY STATEMENT

The Tennessee Court of Criminal Appeals granted the State's motion to dismiss the appeal (Petition, at page A1).

The Petitioner, Mr. Stone, was tried by a jury and convicted of both petit larceny and assault and battery, the State's proof being that Petitioner by use of a pistol forced the victim to pay him a disputed debt (Petition at 5-6).

The constitutional errors which Petitioner urges upon this Court are as follows:

1. Prejudicial denial of a continuance
2. Ineffective assistance of counsel
3. Denial of a right to appeal

ARGUMENT

A. The Trial Judge Did Not Improperly Deny a Continuance.

From the petition itself it appears that the Court stated: "Mr. Summers [defense attorney], if you are making a motion for a continuance, I am going to overrule you. I talked to his doctor personally, and his doctor assured me that he was well able to stand trial, so I am going to overrule you" (Petition, at 3). This alleged error has not been preserved. No offer of proof was made to the trial judge and at this date no offer of proof has yet been made to anyone.

There is no allegation that the defense was hampered by Mr. Stone's physical condition.

B. The Petitioner Has Not Been Denied His Right to Effective Assistance of Counsel.

Mr. Stone in his petition filed herein takes the position that his own privately retained attorney kept him off the witness stand until he would have been the last witness, well knowing that Tennessee law requires a defendant to testify first or not at all, and this as a matter of law amounts to incompetence of counsel. Defendant knew he could testify and that he had that right. He was aware that Tennessee law requires the defendant to testify first or not at all (Petition, at 4). Knowing the same, Defendant through retained counsel, made a deliberate choice not to testify. He should not be allowed now to profit from his decision not to testify, a decision made with the advice of an attorney chosen and paid by him.

C. Petitioner Was Not Denied an Appeal Because He Voluntarily Relinquished His Right of Appeal.

Tennessee Code Annotated §§ 40-2901 et seq.[1] give the trial judge authority to suspend sentence where the maximum punishment does not exceed ten years. The Tennessee Supreme Court has held that after an appeal, the trial court cannot grant probation because the "trial court has lost jurisdiction of the cases by an appeal of the parties to this Court [Tennessee Supreme Court]." **Hethcoat v. State**, 213 Tenn. 563, 565, 376 S.W.2d 478 (1964). **Accord, Helton v. State**, 195 Tenn. 491, 260 S.W.2d 260 (1953); **Atchley v. State**, 176 Tenn. 574, 144 S.W.2d 748 (1940); and **Anderson v. Thompson**, 75 Tenn. (7 Lea.) 259 (1881).

The Tennessee Court of Criminal Appeals, Eastern Division, recently reaffirmed this principal in **Sams v. Russell** (unreported, filed July 31, 1970). This opinion is reproduced as Appendix B to this brief.

The rule that one who voluntarily applies for probation or parole waives his right to appeal by acquiescence in the judgment is known in the federal courts as the **Mooneyham** rule. See, **State v. Mooneyham**, 192 Kan. 620, 390 P.2d 215, **cert. denied** 377 U.S. 958, said rule being held constitutional by the Tenth Circuit in **Mooneyham v. State of Kansas**, 339 F.2d 209 (10th Cir. 1964).

---

[1] Tenn. Code Annot. §§ 40-2901-2904 are reproduced as Appendix A to this brief.

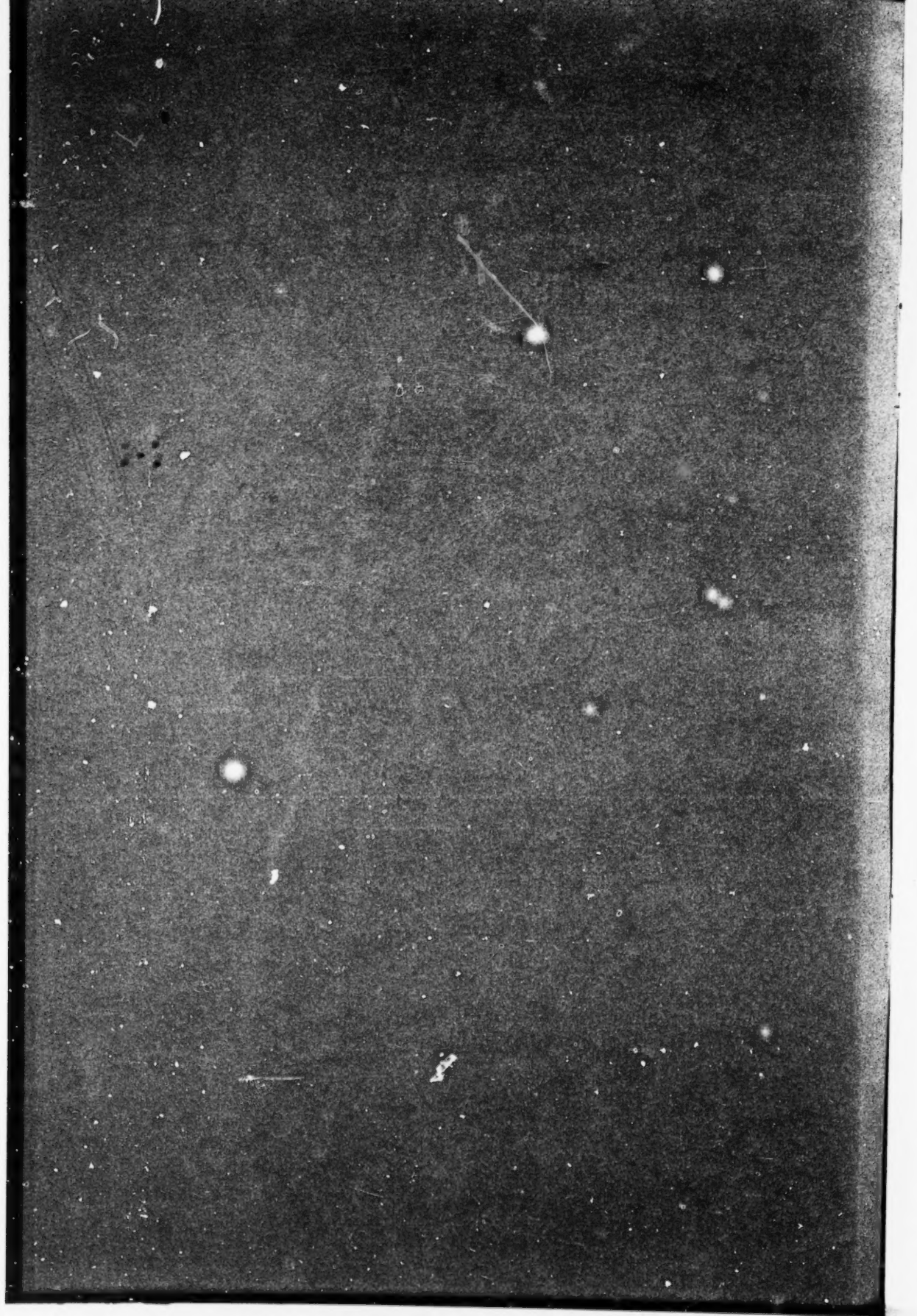
CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted

BART C. DURHAM, III
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219
Telephone: (615) 741-2091
Attorney for Respondent

Of Counsel
DAVID M. PACK
Attorney General



APPENDIX A

Tenn. Code Annot.:

SUSPENSION OF SENTENCE

40-2901. Powers of trial judge—Costs.—Whenever any person has been found guilty of a crime upon a verdict or a plea of guilty, all trial judges in the state having criminal jurisdiction are authorized and empowered to suspend the execution of sentence and place the defendant or defendants on probation, subject to such conditions as the trial judge may deem fit and proper. The trial judge shall possess the power to set the duration of such suspension at any period of time equal to the minimum sentence, but not more than the maximum sentence provided for the offense committed by the defendant or defendants, and to terminate the balance of such suspension at any time not less than the minimum provided for the offense committed by the defendant or defendants. For the purpose of this chapter, trial judges shall be held to include a trial judge before whom such defendant was tried and convicted, and shall also include the successor of such trial judge. As used in this chapter, the word "defendant" means any person convicted of a misdemeanor or convicted of any felony, the maximum punishment for which does not exceed ten (10) years' confinement in the state penitentiary. The trial judge shall have discretionary authority to suspend a sentence and place the defendant on probation without requiring that the defendant first either secure or pay the costs accrued in the case at the instance of the state. [Acts 1931, ch. 76, § 1; C. Supp. 1950, § 11802.1; Acts 1961, ch. 95, § 1; 1963, ch. 192; § 1; 1967, ch. 101, § 1.]

* * * * * * *

40-2902. Entry of judgment and suspension—Probation.—Any trial judge desiring to suspend a sentence and place the defendant or defendants on probation as provided for in § 40-2901, shall first pronounce judgment against the defendant or defendants and then shall suspend the execution thereof by placing the defendant upon probation, subject to such conditions of probation as the trial judge shall deem fit and proper and shall direct that such defendant or defendants be under the supervision of the board of probation and paroles created under § 40-3601, et seq., except in those counties which have their own probation officers. The trial judge shall cause the judgment, the suspension of imprisonment, the duration of the probation period, the conditions of the probation, and date of termination of probation to be entered on the minutes of his court in the same minute entry, and copies of such minute entry shall be delivered to the probation and paroles officer and to the probationer. [Acts 1931, ch. 76, § 2; C. Supp. 1950, § 11802.2; Acts 1961, ch. 95, § 2; 1963, ch. 192, § 2.]

* * * * * * * *

40-2903. No suspension after service of part of sentence—Exceptions.—No trial judge shall have the authority under the provisions of § 40-2901, to suspend the execution of sentence after the defendant shall have begun to serve such sentence, except where the sentence is to confinement in the county jail or workhouse for a period of time less than one (1) year, with or without a fine. In such cases, the trial judge, may, at any time after the defendant has actually served not less than thirty (30) days of such jail or workhouse sentence, suspend the remainder thereof despite the expiration of the term of court at which such judgment was pronounced or an earlier refusal to suspend in toto such judgment. Nothing herein shall be construed as granting to trial judges the right to

suspend the payment of fines except at the term at which judgment therefor was rendered. [Acts 1951, ch. 35, § 1.]

* * * * * * *

40-2904. Investigation and report by probation and paroles officer—Supervision of parolee.—The power of suspension and probation is within the sole discretion of the trial judge, however, when a probation and paroles officer is available to the court, no defendant shall be placed on probation until a written report of investigation by a probation and paroles officer shall have been presented to and considered by the court, provided the probation and paroles officer to whom such matter has been referred shall file his report within ten (10) days after such reference. Said report shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Whenever the trial judge deems it desirable, such investigation shall include a physical and mental examination of the defendant, the expense of which shall be adjudged as part of the costs. All persons released on probation shall be subject to the direct supervision of the board of probation and paroles, and each such probationer must report as directed to his probation and paroles officer until release from supervision. No probationer shall be allowed to leave the jurisdiction of his probation and paroles officer without the express permission of the trial judge. [Acts 1931, ch. 76, § 2; C. Supp. 1950, § 11802.2, Acts 1961; ch. 95; § 4; 1963, ch. 192, § 3.]

* * * * * * *

APPENDIX B

The Court of Criminal Appeals of Tennessee
Knoxville

Joe Mack Sams and Carl Neer, Plaintiffs in Error, v. Lake F. Russell, Warden, Defendant in Error.	No. 10 Anderson County Honorable Roland Prince, Judge (Sitting by Interchange) (Habeas Corpus)

* * * * * * *

Opinion Filed: July 31, 1970.

Affirmed:

W. Wayne Oliver, Judge. **UNREPORTED**

OPINION

Joe Mack Sims, the petitioner below, now indigent and represented in this proceeding by court-appointed counsel, an inmate of the State Penitentiary where he is serving a three to four year sentence adjudged by the Criminal Court of Anderson County upon his conviction of third degree burglary, appeals to this Court from the judgment of that court dismissing, after a full evidentiary hearing, a habeas corpus petition filed by him and his co-defendant Neer. Neer has not appealed. Sams was represented in his trial by retained counsel.

The petition for the writ of habeas corpus, as amended, attacked the petitioners' conviction upon the grounds (1) that they were denied their right of appellate review because their counsel failed to file a motion for a new trial and perfect their appeal to this Court, notwith-

standing "that they did everything within their power to compel their attorney to appeal the case, but to no avail," and (2) that the trial jury was tampered with during the trial by prosecution witnesses talking to some of the jurors while the jury was illegedly separated and not under the supervision of an officer, and that they were thereby denied their constitutional right to a fair and impartial trial.

The State's answer denied that any prejudicial error occurred during the trial, and specifically stated that the petitioners did not desire to appeal their convictions and filed a petition for probation in the trial court.

In dismissing the petition, the trial court entered a written finding of fact holding (1) that the petitioners were fully advised by their retained counsel and did not request their counsel to take any step toward perfecting an appeal from their convictions, and agreed to file a petition for parole instead of a motion for a new trial, and (2) that the jury was not separated during the trial and no juror was approached or talked to by any person.

Sams' Assignments of Error here challenge the trial judge's finding and dismissal of his petition. In considering these Assignments, we must adhere to the settled rule that the findings of the trial court, upon questions of fact, are conclusive unless this Court finds that the evidence preponderates against the lower court's judgment. **State ex rel. Hall v. Meadows**, 215 Tenn. 668, 389 S.W.2d 256; **State ex rel. Johnson v. Mainard**, 188 Tenn. 501, 221 S.W.2d 531; **Gray v. Johnson**, 354 F.2d 986 (6th Cir. 1965); **Bates v. Meadows**, 358 F.2d 674 (6th Cir. 1966); **State ex rel. Lawrence v. Henderson**, ... Tenn. Crim. App. ..., 433 S.W.2d 96.

Our Supreme Court has held many times that the findings of a trial judge in an oral hearing, who sees and hears the witnesses testify, and hears and considers con-

flicting testimony, will be given the weight of a jury verdict. **Taylor v. State**, 180 Tenn. 62, 171 S.W.2d 403; **Atlas Powder Co. v. Leister**, 197 Tenn. 491, 274 S.W.2d 364. In the **Atlas Powder Co.** case, the Court adopted the principle that the trial judge who hears the witnesses testify is the judge of their credibility the same as a jury is in a jury case, and adopted the following statement from **Ferguson v. State**, 138 Tenn. 106, 196 S.W. 140:

> "We have said in numerous cases that the verdict of the jury determines the credibility of witnesses. This is necessarily so. We do not see the witnesses nor hear them testify, and mere discrepancies in their testimony must be deemed settled by the verdict of the jury unless there is something to show that such discrepancies originated in willful falsehood."

Upon a careful review of this record, we cannot hold that the evidence preponderates against the findings and judgment of the trial judge.

Aside from the well-settled principle of law that the failure of Sams' retained counsel to perfect an appeal of his conviction was imputable to him and not to the State, **State ex rel. Dych v. Bomar**, 213 Tenn. 699, 378 S.W.2d 772; **Russell v. State ex rel. Arthur**, 218 Tenn. 118, 401 S.W.2d 586; **State ex rel. Johnson v. Heer**, 219 Tenn. 604, 412 S.W.2d 218; **State ex rel. Donehue v. Russell**, 221 Tenn. 609, 429 S.W.2d 818, he confronts here an equally fundamental and insuperable barrier.

In the hearing upon this petition, the State introduced a copy of Sams' sworn petition for probation and suspension of his sentence, which he filed, pursuant to TCA, §§ 40-2901, et seq., on the 9th day of the 10 days allowed by the trial court for filing a motion for a new trial. In this petition for probation and suspension of sentence, Sams stated, *aliunde:* (1) that he has been indicted and

convicted of third degree burglary and sentenced to four years in the penitentiary, (2) that "he is very sorry for what he did; that he has worried a great deal about what has happened; and that he is willing to be placed on probation for any amount of time that the Court sees fit," (3) that he "realizes what a serious mistake he made, and that he realizes he has brought shame upon himself, his family, and realizes now more than ever what it means to abide by all laws and be a useful citizen in the community in which he lives." He agreed to pay all the costs of the cause, and prayed the court to place him on probation and suspend his sentence. The petition was signed by him and his retained trial counsel.

By filing that petition, Sams waived his right to appeal his conviction. By admitting his guilt of the crime of which he was convicted and expressing penitence he placed himself in the same attitude, insofar as his right of appeal was concerned, as if he had knowingly and voluntarily pleaded guilty at his trial. The law is settled in this State that there is no right of appeal from a legal conviction upon a knowledgeable and voluntary plea of guilty. **McInturff v. State**, 207 Tenn. 102, 338 S.W.2d 561.

An application for probation and suspension of sentence is not available as a means of urging errors in the conduct of the trial. **People v. Erickson**, 74 Cal.App.2d 399, 168 P.2d 417. By the very nature of such a proceeding, appealing to the court for mercy, its purpose is not to contest the conviction and sentence; instead, it concedes the validity of both. Thus, the convicted defendant who files a petition for probation and suspension of sentence thereby waives his right of appeal upon exactly the same principle which precludes appeal by one convicted upon a plea of guilty understandingly and voluntarily entered.

Probation is merely the condition resulting from a suspension of sentence. **State ex rel. Wilson v. Lowdermilk**, 245 Ind. 93, 195 N.E.2d 476.

By asking that his sentence be suspended and that he be released on probation, the convicted defendant says to the court, in effect, that he was rightly convicted. He may not thus admit guilt to escape imprisonment and at the same time protest his innocence and insist upon reserving a right of appeal to challenge his conviction. His voluntary application for suspension of the execution of the sentence and release on probation constitutes recognition of the validity of the judgment and acquiescence therein and a waiver of the right of appellate review. **State v. Walker,** 196 Kan. 464, 413 P.2d 128.

The sound basis of the underlying theory of the rule was well expressed by the Supreme Court of Kansas in **State v. Robertson,** 193 Kan. 668, 396 P.2d 323:

> "He is precluded from appealing, not because he expressly and understandingly waived such right, but because he expressly and understandingly took action which, in and of itself, was inconsistent with an intention to appeal. Since his request for parole, and the consequent acquiescence in the judgment and its validity, was intentionally made, the fact that the appellant may not have understood that he would be bound by the reasonable and logical implications of his action, thereby foreclosing an appeal is immaterial."

The Court also held in **State v. Robertson,** supra, that the rule applies regardless of whether the defendant was specifically advised of his right to appeal or not. And in **Sanders v. State,** 195 Kan. 701, 408 P.2d 587, that Court held that a defendant acquiescing in and recognizing the validity of the judgment of conviction by seeking and securing probation is not permitted to challenge the validity of that judgment in a collateral proceeding. The Court said: "To hold otherwise would be to say that appellant can now accomplish a result in a collateral proceeding that he could not have attained by direct appeal."

Of course, it must be conclusively presumed that a convicted defendant who files with the trial court an application for suspension of his sentence and release upon probation does so in good faith and with the full intention of accepting probation if granted by the court. So, the established principle that such an application precludes the right to seek appellate review of the conviction follows inexorably from, if indeed it is not an inseparable part of, the settled rule of law that one who is successful in such an application has no right of appeal.

In **People v. Dowd**, 27 Ill.App.2d 429, 170 N.E.2d 179, the Court said:

> "At the outset it is clear that if defendant, by his motion for probation made after the court denied his motion for new trial, waived his right to appeal, then all other points raised by defendant are moot. The rule in the state is clear that where a defendant moves for release on probation which is granted, and affirmatively assents to the order granting probation and accepts the benefits of probation, his choice between the suspension and contesting the judgment of conviction should be final. He should not be permitted to reverse his stand and take advantage of the alternative he had theretofore rejected."

In **State ex rel. Wilson v. Lowdermilk**, supra, the Indiana Supreme Court said: "In event the defendant accepts the benefits of a suspended sentence and goes at liberty under the terms of the probation, he may not thereafter appeal."

Stating the general rule that the voluntary acceptance of a suspended sentence and probation or parole waives the defendant's right to appeal, the author of an annotation in 117 A.L.R., beginning at page 929, says that the reasons for this rule are probably better stated in **Brooks**

v. State, 51 Ariz. 544, 78 P.2d 498, 117 A.L.R. 925, than in any other decision. We agree. In that case the Court said:

> ". . . His choice between the benefits of suspension and contesting the case further is final, hence, he cannot thereafter reverse his stand and take advantage of the alternative he had theretofore rejected. By choosing probation he is automatically estopped from appealing and by deciding in favor of appeal he estops himself from benefitting from suspension. He cannot profit from both at the same time, or as the old saying runs, 'He cannot eat his cake and have it too.' "

See also: **Renado v. Lummus**, 205 Mass. 155, 91 N.E. 144; 24 C.J.S., Criminal Law, § 1668, p. 1048.

The judgment of the trial court reached the correct result in dismissing this petition, and is affirmed.

/s/ W. WAYNE OLIVER
W. WAYNE OLIVER
Judge

Concur:

.....
MARK A. WALKER
Presiding Judge

.....
ORIS D. HYDER
Judge